Supreme Court, U.S.
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No. ——

IN THE
# Supreme Court of the United States

MICHAEL MALLOY,
*Petitioner,*

*v.*

UNITED STATES OF AMERICA,
*Respondent.*

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Petitioner, a United States Capitol police officer, was enticed by a friend into having sexual relations with a young woman whom Petitioner believed was an adult. Both the woman and friend told Petitioner that she was a nineteen-year-old college student, when she was actually one month shy of her fifteenth birthday. While Petitioner and the woman engaged in relations, a videotape was made. The video was kept by Petitioner and was never copied or disseminated. Petitioner was charged under 18 U.S.C. § 2251(a) with using a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction thereof. At trial, Petitioner was precluded from raising a reasonable mistake of age defense.

The question presented is whether the Free Speech Clause of the First Amendment requires that a defendant be permitted to present a reasonable mistake of age defense to a charge under 18 U.S.C. § 2251(a).

## PARTIES TO THE PROCEEDING

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Petitioner, Michael Malloy, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

## OPINIONS BELOW

The decision of the court of appeals denying Petitioner's Petition for Rehearing and Rehearing en Banc (App. 42a) is unreported. The opinion of the court of appeals denying Petitioner's appeal (App. 1a-29a) is reported at 568 F.3d 166. The judgment of the district court (App. 30a-41a) is unreported.

## JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit denying the petition for rehearing en banc was entered on August 4, 2009. This petition was filed within 90 days of entry of judgment. Therefore, the jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Supreme Court Rule 13.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law * * * abridging the freedom of speech." Section 2251(a) of Title 18 of the United States Code is reproduced in the appendix to this petition. App. 43a-46a.

## STATEMENT OF THE CASE

In December 2006, Petitioner was charged with one count of sexual exploitation of a minor for the purpose of producing a visual depiction in violation of 18 U.S.C. § 2251(a) in the United States District Court for the District of Maryland. App. 3a. Section 2251, which prohibits the sexual exploitation of children, provides in pertinent part:

> Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in ... any sexually explicit conduct for the purpose of producing any visual depiction of such conduct shall be punished as provided under subsection (e) ... if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means.

In the fall of 2005, Petitioner Michael Malloy, a United States Capitol Police Officer, had consensual sexual relations with S.G., a young woman whom he believed to be a 19-year-old Bowie State University student. (JA 296-97).[1] A friend, Aaron Burroughs, had introduced Mr. Malloy to S.G., and had brought her to Mr. Malloy's home. (JA 197). On two occasions, S.G. engaged in oral and vaginal sex with the two men. (JA 198-200). As Mr. Malloy later found out, S.G. was not

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[1] All "JA" references refer to the Joint Appendix filed with Petitioner's appeal in the Fourth Circuit on March 25, 2009.

a college student, but rather was an under-aged prostitute Burroughs had been introducing to friends and others at that time. (JA 205, 207-08). Mr. Malloy attempted to establish a reasonable mistake of age defense, but was prohibited from doing so. (JA 16, 93, 107-12).

The Government filed a pretrial motion in limine to preclude the defendant from arguing or introducing evidence that he lacked knowledge that the victim was a minor. (JA 4). At a pretrial hearing on the matter, the Government argued that knowledge of the age or knowledge of the fact that the victim was a minor was not an element of sexual exploitation of a minor under Section 2251. (JA 84). The Government further contended that mistake of age was not available as an affirmative defense to the crime. (JA 84-85). Finally, the Government argued that the First Amendment did not require a "judicially created reasonable mistake-of-age defense." (JA 91).

Trial counsel for Mr. Malloy countered that "we absolutely intend to present a mistake-of-age defense." (JA 93). The district court heard lengthy arguments on the point, ultimately ruling that the defense was not available. (JA 107-12). Analogizing the offense at hand to statutory rape, the court granted the Government's motion in limine, stating that the mistake-of-fact defense in such cases was "the exception rather than the rule." (JA 108). The district judge went on to comment that there was no affirmative defense "normally associated with this statute." (JA 110).

According to her birth certificate, identification card, and testimony, S.G. was born on November 9, 1990. (JA 186, 404, 486). In the fall of 2005, S.G. was starting the tenth grade at Bowie High School. (JA 196). At that time, she was a manager for the school's football team. (JA 197). Aaron Burroughs was the coach. (*Id.*). S.G. "became involved" with Burroughs outside of school during that time. (JA 197).

According to S.G., in mid-October of 2005, Burroughs took S.G. to Mr. Malloy's house. (JA 197). After the three talked for a while, S.G. engaged in oral and vaginal sex with both Burroughs and Mr. Malloy. (JA 198-99). The two men took turns videotaping the other's sexual activities with S.G. (JA 199). S.G. went back to Mr. Malloy's house in late November 2005 and again engaged in sexual activities with Mr. Malloy and Burroughs. (JA 199-200). S.G. was not certain whether those activities were videotaped. (JA 200).

S.G. further testified that she had known Burroughs since her freshman year in high school, had become sexually active with him, and had started prostituting for him in the fall of 2005. (JA 205). S.G. admitted that she and Burroughs had a "plan" whereby she would tell anyone she had sex with that she was "19 years-old and attending Bowie State." (JA 207). S.G. further admitted that she heard Burroughs tell people on numerous occasions that she was "19 and attending Bowie State." (JA 208). Finally, S.G. testified that she posted a reference to pledging AKA, a sorority at Bowie State, in an on-line diary. (JA 220-21, 494).

Mr. Malloy testified in his own defense. (JA 287). A 15-year veteran of the United States Capitol Police, he had a top secret clearance and had worked with the Dignitary Protection Unit. (JA 288-89). He first got to know Aaron Burroughs in 1984, when the two were in the seventh grade. (JA 293). The two men had on again and off again contact over the ensuing two decades. (JA 293).

According to Petitioner, in November or December of 2005, Mr. Malloy first met S.G. through the auspices of Burroughs. (JA 293). That first meeting occurred at the Fairchild Building on Capitol Hill, in Washington, D.C. (JA 294). S.G. told Mr. Malloy that she was 19 years old and was a sophomore at Bowie State University. (JA 296-97). Mr. Malloy told S.G. that his brother had graduated from Bowie State and the two discussed the college. (JA 297-98). On two later occasions, Mr. Malloy had sex with S.G. (JA 298).

The activity between Mr. Malloy and S.G. and Burroughs came to the attention of Special Agent William McDermott of the FBI in the summer of 2006. (JA 247). After interviewing S.G. and Burroughs on July 31, 2006, McDermott visited Mr. Malloy at his place of employment on August 1, 2006. (JA 256). Mr. Malloy voluntarily told McDermott that he had sex with S.G. (JA 257-58). McDermott told Mr. Malloy that S.G. was a juvenile; and, Mr. Malloy told McDermott that he was told she was 19 and a student at Bowie State University. (JA 262-64). McDermott further testified that Mr. Malloy had asked about S.G.'s age because she "appeared young." (JA 275).

The parties stipulated that the video recording recovered from Mr. Malloy's home depicted Mr. Malloy "engaging in genital and oral sexual intercourse with S.G." (JA 403). The stipulation further provided that this exhibit proved "beyond a reasonable doubt that the defendant used S.G. to take part in sexually explicit conduct for the purpose of producing a visual depiction of that conduct." (JA 403). To establish that the video recording was produced using materials that had been transported in interstate or foreign commerce, the Government called a witness from Sony Electronics. (JA 169). Michael Hogan testified that the camcorder was manufactured in Japan and that the videotape was manufactured in Mexico. (JA 170). At the end of the case, defense counsel made a motion for judgment of acquittal on the ground that the indictment had been constructively amended. (JA 321-29). The district judge denied the motion. (JA 330-31). The jury found Mr. Malloy guilty on the one count submitted to it. (JA 396).

The district judge held a sentencing hearing on January 9, 2008. (JA 405). Defense counsel argued that the imposition of a 15-year mandatory minimum sentence constituted cruel and unusual punishment under the Eighth Amendment. (JA 432-41). Noting that Congress mandated that Mr. Malloy had to serve at least 15 years and that Fourth Circuit precedent did not permit the finding of an Eighth Amendment violation, the district judge sentenced Mr. Malloy to 180 months. (JA 459-61). The court noted, however, that it would have given a lower sentence if it were permitted by law. (JA 460).

Petitioner noted an appeal from this judgment on January 9, 2008. On May 28, 2009, the Fourth Circuit affirmed Petitioner's conviction. App. 27a. Petitioner filed a timely petition for rehearing and for rehearing en banc, which was denied on August 4, 2009. App. 43a.

## REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Fourth Circuit ruled that a reasonable mistake of age defense to a charge under 18 U.S.C. § 2251(a) was not constitutionally required. That holding is incorrect and warrants this Court's review. Moreover, the lower courts are in conflict as to whether a reasonable mistake of age defense is available to a charge under the statute. Based on the information provided to him by S.G. and Petitioner's friend, Petitioner believed that he had made a legal videotape of himself having sex with a consenting adult. The First Amendment requires that a reasonable mistake of age defense be available as a defense to a charge under 18 U.S.C. § 2251(a). To hold otherwise would have a chilling effect on protected speech and could subject a defendant to strict liability based primarily on how accomplished a minor is at deception.

### I. The Lower Courts Are in Conflict on Whether to Recognize a Reasonable Mistake of Age Defense to a Charge Under 18 U.S.C. § 2251(a).

There is a split among the Circuits as to whether to recognize a reasonable mistake of age defense to a charge under 18 U.S.C. § 2251(a). In

*United States v. United States District Court*, 858 F.2d 534 (9th Cir. 1988), the Ninth Circuit held that the First Amendment required that a reasonable mistake of age defense be available to this charge. However, in interpreting a different section of the same statute regarding the same act(s) described in § 2251(a), but taking place outside of the United States, the Eleventh Circuit held the opposite, that a mistake of age defense is not required in prosecutions brought under Section 2251(c)(2). *See United States v. Deverso*, 518 F.3d 1250, 1257 (11th Cir. 2008) (citing cases); *cf. Gilmour v. Rogerson*, 117 F.3d 368, 370-73 (8th Cir. 1997) (considering on habeas review Iowa statute similar to Section 2251(a)).

Likewise, State court decisions construing statutes analogous to Section 2251(a) are in conflict regarding whether a reasonable mistake of age defense is available to a charge under such statutes. Similar to the Ninth Circuit, the Court of Appeals of Maryland has likewise engrafted a reasonable mistake of age defense to a state statute prohibiting the photographing of a minor engaged in sexually explicit conduct. *See Outmezguine v. State*, 641 A.2d 870, 883-85 (Md. 1994) (although scienter was not an element, a defendant could raise a mistake of age defense). The Maryland court noted that in 25 other states and the District of Columbia, "similar statutes proscribing child pornography require the prosecution to prove scienter or allow a mistake of age defense," and that "only three states expressly preclude a defense of mistake of age." *Id.* at 883-84. In Outmezguine's case, which involved the photographing of a 15-year-old girl in sexually explicit poses, the defendant did not generate the issue of reasonable mistake of age

because he simply asserted that he "did not know how old she was." *Id.* at 886.

In Mr. Malloy's case, however, the issue was clearly generated and the defense should have been permitted under the above authority. Before and throughout his trial, Mr. Malloy asserted that he was told by S.G. and Burroughs that S.G. was a 19-year-old college student. (JA 16, 93, 262-64, 296-97). Even the subject of the sexually explicit video, S.G., admitted her scheme to make people believe that she was 19 and a college student. (JA 207-08). A person's appearance and demeanor may belie her true chronological age, particularly insofar as a 15-year-old girl is involved. This is common knowledge and the photographs of S.G. proffered below bear this out. (JA 487-89, 496).

In sum, a mistake of age defense is constitutionally compelled and should have been available to Mr. Malloy. To recognize such a defense, however, does not guarantee an acquittal. A defendant would still have to show that his actions were reasonable and not the result of carelessness or negligence. At the very least, however, Mr. Malloy should have been given the opportunity to make such a showing. The current division in the lower courts on this point illustrates the necessity of this Court's resolution of the matter.

## II. The First Amendment Requires That a Reasonable Mistake of Age Defense Be Available as a Defense to a Charge Under 18 U.S.C. § 2251(a).

The Court of Appeals for the Ninth Circuit has ruled that a reasonable mistake of age defense is constitutionally required in cases under Section 2251(a). In *United States District Court*, 858 F.2d 534, 540-44 (9th Cir. 1988), the court ruled that notwithstanding the fact that the defendant's awareness of the subject's minority was not an element of the offense, the First Amendment required that a reasonable mistake of age defense be available.

In the Ninth Circuit case, 16-year-old Traci Lords was hired to perform in sexually explicit films. *Id.* at 536. Lords and her agent "perpetrated a massive fraud on what is euphemistically called the adult entertainment industry" as "Lords successfully passed herself off as an adult." *Id.* Because knowledge of the minor's age was not an element of the offense under Section 2251(a), the Government argued that "good-faith mistake could not be a defense." *Id.* Speaking through Judge Kozinski, the court rejected the Government's argument.

The court reasoned that the statute regulates speech, albeit speech that is not protected under the First Amendment. *Id.* at 538. (citing *New York v. Ferber*, 458 U.S. 747, 762 (1982)). Nonetheless, in regulating unprotected speech, care must be taken such that **protected** speech is not chilled. Because the film in which Traci Lords appeared (*Those Young Girls*) was not obscene, it would have been protected

under the First Amendment if not for its depiction of a minor. 858 F.2d at 538. Thus, the subject's age "defines the boundary between speech that is constitutionally protected and speech that is not." *Id.* at 538-39. The Ninth Circuit saw the issue as "whether Congress may subject a defendant to strict liability for misjudging the precise location of that boundary." *Id.* at 539.

After analyzing the relevant Supreme Court decisions, Judge Kozinski concluded "that the first amendment does not permit the imposition of criminal sanctions on the basis of strict liability where doing so would seriously chill protected speech." *Id.* at 540. The Ninth Circuit relied particularly on *Smith v. California*, 361 U.S. 147 (1959), where the Court struck down a law imposing "criminal liability on a bookseller for possession of an obscene book." 858 F.2d at 539. In *Smith*, the Supreme Court noted that the legal doctrine of strict liability, although otherwise constitutional, "cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it." 361 U.S. at 151. Distilling a series of Supreme Court cases, Judge Kozinski concluded that "a speaker may not be put at complete peril in distinguishing between protected and unprotected speech." 858 F.2d at 539.

This, of course, is exactly the effect of Section 2251(a), unless a defendant is allowed "to present a reasonable mistake of age defense." *Id.* The Ninth Circuit concluded:

We are convinced that if put to a choice

> between a statute that punishes severely the use of minors in sexually explicit materials, subject to a reasonable mistake of age defense, and no such statute at all, Congress would choose the former. Under the circumstances, we conclude that section 2251(a) is susceptible to the type of narrowing construction that would save it from fatal collision with the first amendment.

858 F.2d at 543.

Save a cursory discussion in passing in a footnote in *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77 n.5 (1994), this Court has never directly examined this issue. Given the intervening decisions in the Ninth and Eleventh Circuits and given the confusion among the lower courts, it is particularly crucial to resolve this issue.

Although Congress did not specifically provide for a reasonable mistake of age defense to a charge under 18 U.S.C. § 2251(a), if this Court determines that such a defense is constitutionally required, the Court may engraft the defense as a matter of decisional law, as the Ninth Circuit did. Moreover, this Court has recognized that Congress enacts criminal laws "against the background of Anglo-Saxon common law." *See United States v. Bailey*, 444 U.S. 394, 415 n.11 (1980). It follows that, even when Congress does not specifically provide for a common law defense, a defendant can nonetheless rely on it. *See United States v. Mooney*, 497 F.3d 397, 403 (4th Cir. 2007). As the Fourth Circuit noted in *Mooney*,

interpreting *Bailey*:

> The proper conclusion from *Bailey* is that Congress' failure to provide specifically for a common law defense in drafting a criminal statute does not necessarily preclude a defendant charged with violating the statute from relying on such a defense." *United States v. Panter*, 688 F.2d 268, 271 (5th Cir.1982). This conclusion is not surprising, however, inasmuch as statutes rarely enumerate the defenses to the crimes they describe, and defenses continue to remain doctrines of the common law, the background against which Congress enacts federal crimes.

497 F.3d at 403. Thus, the fact that Congress did not expressly provide for a reasonable mistake of age defense in § 2251(a) does not preclude such a defense from being raised.

## III. The Question Presented Is Important.

As the Ninth Circuit noted in *United States District Court*, despite our feelings toward the subject matter, the rights protected under the First Amendment are inviolate and the duty of this Court to protect those rights is nonetheless invoked:

> [T]he first amendment interest we are protecting, the right to produce salacious movies-is intrinsically unworthy of much

> solicitude. Nevertheless, the first amendment is as close to an absolute as we have in our jurisprudence: Speech shielded by the amendment's protective wing must remain inviolate regardless of its inherent worth. The distaste we may feel as individuals toward the content or message of protected expression cannot, of course, detain us from discharging our duty as guardians of the Constitution. See, e.g., *Cohen v. California*, 403 U.S. 15, 24-26, 91 S.Ct. 1780, 1787-89, 29 L.Ed.2d 284 (1971) (vulgar expression displayed in public courthouse); *Brandenburg v. Ohio*, 395 U.S. 444, 448-49, 89 S.Ct. 1827, 1830-31, 23 L.Ed.2d 430 (1969) (per curiam) (Ku Klux Klan cross-burning); *Collin v. Smith*, 578 F.2d 1197, 1203 (7th Cir.) (neo-Nazi march through Jewish neighborhood), *cert. denied*, 439 U.S. 916, 99 S.Ct. 291, 58 L.Ed.2d 264 (1978).

*United States District Court*, 858 F.2d at 541.

Moreover, if a defendant is not permitted to raise a reasonable mistake of age defense to a charge under the statute, the sweep of the statute will be far broader than Congress ever intended. Petitioner reasonably believed that he was having a consensual interaction with an adult and that, similar to a consenting married couple choosing to videotape their sexual interaction for their private use and enjoyment, no law prohibited Petitioner from videotaping this encounter with the consent and cooperation of the

woman involved. Petitioner was affirmatively misled by his friend and S.G. and was subject to fifteen years imprisonment because he believed them.

Without a reasonable mistake of age defense, any individual who has no inclination or interest in producing or consuming child pornography is subject to serious criminal liability based solely on his or her good faith belief in an efficacious lie, i.e., the age of a young woman, rather than criminal intent. An individual's liberty could hinge on how effectively he was deceived. To be sure, Petitioner was not the intended target of this statute. However, without a reasonable mistake of age defense, the liberty and First Amendment rights of those who are guilty of nothing more than being deceived are vulnerable to the whim of any young person who takes it upon herself to tell a convincing lie.

## CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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